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Nos. 94-1893; 94-1900

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, *et al.*,
and
NATIONAL CABLE TELEVISION ASSN., INC.,
Petitioners,

v.

BELL ATLANTIC CORPORATION, *et al.*
Respondents.

On Petitions for Writ Of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF AMICUS CURIAE GTE CORPORATION IN SUPPORT OF RESPONDENTS

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RULE 29.1 STATEMENT

Amicus curiae GTE Corporation is a publicly-held corporation in the business of providing telecommunications services and products to the general public. GTE Corporation is the parent company of GTE Service Corporation and the GTE telephone operating companies. The following subsidiaries of GTE Corporation have securities in public hands:

BC Telecom, Inc.
Caribbean Reservation Center, C. por A.
Communicaciones Telefonicas, C. por A.
Florence Cellular Telephone Company, Inc.
GTE California Incorporated
GTE Directories Corporation Lanka (PVT.) Ltd.
GTE Florida Incorporated
GTE Hawaiian Telephone Company Incorporated
GTE North Incorporated
GTE Northwest Incorporated
GTE South Incorporated
GTE Southwest Incorporated
Jacksonville Cellular Telephone Corp.
Jacksonville Cellular Communications, Inc.
La Compagnie de Telephone Anglo-Canadienne/
Anglo-Canadian Telephone Company
MTX Italia
Parque Industrial ITABO, S.A.
Quebec-Telephone
Radiowealth, Inc.
The Micronesian Telecommunications Corporation
Wilmington Cellular Telephone Corp.
Wilmington Cellular Communications, Inc.
Zona France Las Americas

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BRIEF OF AMICUS CURIAE GTE CORPORATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

Amicus curiae GTE Corporation and its affiliated companies are in the business of providing telecommunications services and products, including local telephone services, to the general public. *Amicus*, like respondent Bell Atlantic, has challenged the constitutionality of 47 U.S.C. § 533(b), which prohibits telephone companies from providing "video programming" to subscribers in their service area. In *GTE South v. United States*, Civ. Action No. 94-1588-A (E.D. Va. Jan. 15, 1995), the District Court declared that § 533(b), on its face, violates GTE's right of free speech guaranteed by the

First Amendment of the United States Constitution. The Government has filed a notice of appeal in *GTE South*, but the parties have agreed to stay that appeal pending resolution of this case by this Court. *Amicus* GTE Corporation therefore has a substantial interest in this Court's determination of the constitutionality of § 533(b).[1]

ARGUMENT

Amicus GTE Corporation respectfully submits that this Court should either: (i) deny the petitions for writ of *certiorari*; or (ii) grant them and consider this case on the merits. In no event, however, should the Court indulge the Government's request to grant the petition, vacate the judgment below, and remand for further consideration ("GVR") without considering the case on the merits.

The speech-regulating regime embodied in the FCC's *Third Report and Order*, FCC 95-203 (May 16, 1995) (reprinted in Appendix to Govt. Supp. Br. at 1a-21a), is either a significant new legal development or it is not. GTE believes it is not. But either way, the *Third Report and Order* most assuredly does not justify a GVR.

I. BECAUSE THE "GOOD CAUSE" WAIVER ARGUMENT IN THE *THIRD REPORT AND ORDER* IS NOT NEW, THE PROPER WAY FOR THE GOVERNMENT TO PURSUE THAT ARGUMENT IS ON THE MERITS IF THIS COURT GRANTS *CERTIORARI*.

We believe that, for purposes of the important constitutional questions presented by this case, there is nothing new in the *Third Report and Order*. Indeed, the *Third Report and Order* is really nothing more than a legal brief, signed by

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[1] GTE has obtained the written consent of Petitioners, the United States and the National Cable Television Association ("NCTA"), as well as of Respondent Bell Atlantic Corporation, to file this *amicus* brief. The letters of consent are on file with the Clerk of this Court.

the FCC, that attempts to "beef up" the very legal argument the Government lost below.

The "good cause" waiver provision has always been in the statute, which was enacted in 1984. Moreover, as Bell Atlantic explains in its Response, the Complaint in this case specifically alleged that the "good cause" waiver provision was unconstitutional and the Government argued below that the "good cause" waiver provision "obviate[d] the [need]" for invalidating § 533(b). *See* Resp. Br. at 19 n.27. Furthermore, by invalidating the statute *on its face*, the courts below necessarily rejected the Government's "good cause" waiver argument and determined that *no* possible application of the statute's waiver proviso could save its constitutionality. *See, e.g., United States v. Salerno*, 481 U.S. 739, 745 (1987) (facial "challenger must establish that *no set of circumstances exists* under which the [statute] would be valid.") (emphasis added).

Nor does the *Third Report and Order* adopt any specific new standards that meaningfully alter the capacity of the "good cause" waiver provision to "save" § 533(b) from unconstitutionality. To the contrary, the *Third Report and Order* does not even attempt to set forth what specific standards and conditions will govern the FCC's decision whether to grant a "good cause" waiver.

Because, in our view, there is nothing new about the Government's "good cause" waiver argument, the proper way to consider it is *on the merits* if the Court grants *certiorari*. *See, e.g., United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994) (considering *on the merits* a saving construction urged by the Government for the first time in this Court). But it is ridiculous to suggest that this Court should GVR on the basis of a legal argument that was raised and necessarily rejected below, merely because it now has been repackaged by the Government and duly ratified by the relevant agency.

II. IF THE *THIRD REPORT AND ORDER* REALLY ALTERS THE LEGAL LANDSCAPE, THE PROPER DISPOSITION OF THIS CASE IS TO DENY THE PETITIONS FOR *CERTIORARI*.

Even if, however, the Court were to take at face value the Government's suggestion that the "good cause" waiver interpretation offered by the FCC is new and alters "the legal landscape," Govt. Supp. Br. at 6, that still would be no reason to GVR. This Court has previously held that a party may not obtain vacatur of a judgment below by voluntarily ceasing or altering its conduct. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994); *see also Northeastern Florida Contractors v. Jacksonville*, 113 S. Ct. 2297 (1993) (losing party's voluntary cessation of challenged conduct does not render case moot). There is good reason for this rule. Were the law otherwise, a losing party could effectively postpone the day of final judicial reckoning by simply altering its conduct in the wake of an adverse lower-court decision, and then asking this Court to vacate that judgment to try its luck again below. Our system of justice neither contemplates nor tolerates such judicial ping-pong.[2]

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[2] Neither the Government nor the NCTA cites any case in which this Court has vacated the judgment of a Court of Appeals holding a statute unconstitutional because a party has subsequently come up with a "saving" construction of the statute. Much less have petitioners cited a case analogous to this one—where this Court has GVR'd when an administrative agency, *which was a losing party to the case*, has issued a saving construction *that was previously raised* in the lower courts.

The only case cited by the Government (*see* Govt. Pet. at 16-17) in support of its request for a GVR is *Bureau of Economic Analysis v. Long*, 454 U.S. 934 (1981). That case, however, involved an intervening Act of Congress that changed the governing substantive law in the case. It therefore differs from this case in two significant ways: (i) the asserted basis for GVR was not the action of one of the parties to the litigation, and (ii) the asserted basis for GVR was a *bona fide* legal development, not simply a reformulation of an argument advanced unsuccessfully below.

(continued...)

Thus, if the *Third Report and Order* does establish a new legal regime, the proper disposition of this case is to deny the petitions. If a litigant really changes the legal regime by altering its conduct, there is no basis to overturn the Court of Appeals decision, which decided the case correctly as presented. Thus, if the "good cause" waiver interpretation is indeed something new, the Government should defend the new legal regime embodied in the *Third Report and Order* in another case.

III. WHETHER THE "GOOD CAUSE" WAIVER INTERPRETATION IS OLD OR NEW, IT SURELY DOES NOT SAVE § 533(b) FROM UNCONSTITUTIONALITY.

In any event, whether the "good cause" waiver argument contained in the *Third Report and Order* is old or new, it surely does not save § 533(b) from unconstitutionality. This too militates strongly against indulging the Government's request for a GVR, as it would be a pointless delay of the final vindication of the telephone companies' First Amendment rights.

As a predicate matter, it does not appear that the FCC's interpretation of "good cause" waiver provision in § 533(b)(4) is a permissible reading of the statute. The authority granted by Congress to issue a "good cause" waiver based on the particularized circumstances of the applicant is *not* the authority "routinely" to issue waivers for an entire industry. *See Third Report and Order*, Govt. Supp. Br. at 19a ("[W]e

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[1] (...continued)

We have discovered *no* case in which this Court has GVR'd a lower-court judgment on the ground that the *losing* party below has altered its conduct in a manner asserted to be legally significant. *Cf. City of Chicago v. Environmental Defense Fund*, 113 S. Ct. 486 (1992) (GVR'ing after federal agency—which was *not* a party—clarified construction of statute while case pending before Court); *Oberly v. Baltimore & Ohio R.R.*, 479 U.S. 980 (1986) (GVR'ing after Solicitor General disavowed position taken by federal agency as *amicus* in court of appeals).

will *routinely* grant a waiver . . . where the telephone company agrees to abide by the regulations we will establish governing its provision of video programming.") (emphasis added). A "routinely" issued "good cause" waiver is an oxymoron, *cf. Kleem v. INS*, 479 U.S. 1308 (1986) (Scalia, J., in chambers); *Madden v. Texas*, 498 U.S. 1301, 1304 (1991) (Scalia, J., in chambers), and would eviscerate the flat prohibition contained in § 533(b).[3]

In addition, even if § 533(b)(4) authorized the grant of routine waivers, the interpretation contained in the *Third Report and Order* would not save § 533(b) from unconstitutionality. The regime described by the *Third Report and Order* is nothing more than a flat ban on speech accompanied by a grant of standardless discretion to an administrative agency to license exceptions to the flat ban on speech. This Court has repeatedly held that the government "cannot vest restraining control over the right to speak [in] an administrative official where there are no appropriate standards

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[3] Indeed, the interpretation of the "good cause" waiver provision contained in the *Third Report and Order* is flatly inconsistent with the only authoritative judicial interpretation of § 533(b)(4). In *NCTA v. FCC*, 914 F.2d 285 (D.C. Cir. 1990), the Court of Appeals, at the NCTA's behest, vacated an FCC order granting a good cause waiver to a telephone company. The Court held that "[t]he policy of [§ 533(b)], which the Commission must take into consideration, is to prohibit a telephone company's crossownership of a cable facility absent a finding that a community would not otherwise be served by cable or because the waiver is justified by good cause," and that the waiver was unavailable absent a showing that telephone company participation was "necessary" to the operation of the cable system. *Id.* at 289.

The *Third Report and Order* also flies in the face of the FCC's prior observation that the legislative history of § 533(b) makes plain that "it is the policy of [§ 533(b)] that telephone companies should be prohibited from providing video programming directly to their subscribers in their telephone service area. ***The waiver authority should be narrowly construed and exercised in a manner that does not undermine the basis policy of this subsection.***" *Telephone Company-Cable Television Cross Ownership Rules*, 3 FCC Rcd 5849, 5850 (1988) (quoting 130 Cong. Rec. H 10,444 (daily ed. Oct. 1, 1984) (emphasis added).

to guide his action." *Kunz v. New York*, 340 U.S. 290, 295 (1951). *See also City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1509 n.9 (1993).

For First Amendment purposes, the waiver regime described in the *Third Report and Order* is indistinguishable from a municipality's flat ban on picketing, accompanied by a promise by the mayor that he will grant exceptions to ban according to "speech friendly" standards that he will develop later when he gets around to it. *See Third Report and Order*, Govt. Supp. Br. at 3a-4a) (promising to be "speech-friendly" in granting waivers). It is inconceivable that such a regime passes First Amendment muster. Indeed, the FCC's standardless scheme only strengthens the case that § 533(b) is subject to strict scrutiny.

IV. THE GOVERNMENT'S REQUEST TO GVR SHOULD BE DENIED TO PREVENT MANIPULATION OF THE JUDICIAL PROCESS.

Finally, the Government's request for a GVR should be denied to prevent manipulation of the judicial process. The "good cause" waiver provision in § 533(b)(4) has been part of the statute since it was passed in 1984 (and, indeed, was part of the FCC-imposed prohibition on telephone company video speech even earlier). The FCC could have issued this interpretation any time before this case was filed or while it was being considered in the District Court and Court of Appeals. It even could have done this in the year since the Court of Appeals decided this case. Or, for that matter, the interpretation contained in the *Third Report and Order* could be advanced in this Court if *certiorari* were granted, since the defense was at issue below.

The circumstances surrounding the release of the *Third Report and Order* make it apparent that the document was carefully timed to persuade this Court to GVR without considering this case on the merits. The FCC's "new" interpretation came just one day before the Solicitor General filed his petition for *certiorari*, which in turn was followed

immediately by the Solicitor General's supplemental brief requesting a GVR. We respectfully suggest that this conduct is wrong, and should not be rewarded. Indeed, if the Court were to grant the Government's novel request, we think it would set an unfortunate precedent encouraging litigants (particularly the Government) to time purported changes in the "legal landscape" to manipulate this Court's GVR power to vacate adverse decisions and evade review on the merits.

CONCLUSION

For all the reasons stated herein this Court should either (i) deny the petitions for *certiorari*, or (ii) grant them and set the case for plenary briefing and argument in the usual course. In no event, however, should this Court vacate the decision of the Court of Appeals and remand the case for further consideration.

Respectfully submitted,

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